

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 23, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2634

Cir. Ct. No. 2012CV11071

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MIDWEST DEVELOPMENT CORPORATION,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

MILWAUKEE COUNTY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: PEDRO COLON, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Midwest Development Corporation (Midwest) appeals from a judgment dismissing its complaint. Milwaukee County (the

County) cross-appeals from the judgment dismissing its counterclaim. We affirm the circuit court in all respects.

¶2 Beginning in 1983, Midwest leased property from Milwaukee County which it used as a ski hill, Crystal Ridge Ski Area. Subsequently, Midwest added additional sports-related offerings to the facility. Midwest's long-term lease ended in 2008. From July 2008 to July 2013, Midwest operated the facility under successive one-year renewal terms subject to termination upon ninety days' notice by either party. As relevant to this appeal, the County renewed the lease on February 1, 2012, for one year commencing on July 8, 2012.

¶3 In 2012, the County decided to permit Rock Sports Complex LLC (Rock) to take control of the property leased by Midwest to further develop the site. On July 26, 2012, the county board passed a resolution selecting Rock to operate the property as a ski hill and offer other recreational and entertainment activities on the site. The board's resolution also authorized the termination of Midwest's tenancy.

¶4 In August 2012, Rock obtained permits to enter the site to inspect, perform necessary testing, and "construct Phase I of a sports complex, including roads, buildings, landscaping, athletic fields and related improvements." In early September 2012, Rock began construction on the property and refused to cease such activity.¹

¶5 On September 4, 2012, Midwest sent a default notice to the County alleging breach of the Midwest-County lease owing to Rock's presence on the

¹ Milwaukee County denies that it granted Rock permission to engage in such activity.

property, breach of quiet enjoyment, trespass, and the County's refusal to perform under the Midwest lease's buy back clause. On September 7, the County denied any breach. On September 18, Midwest entered into an agreement with Rock (the mitigation agreement) that provided as follows: in exchange for a \$400,000 payment, a principal of Midwest, John Kashian, agreed to act as a consultant to Rock, Midwest agreed to a covenant not to compete, Rock obtained use of the Crystal Ridge name and logo, Rock obtained access to the property to begin improvements and construction before the County terminated Midwest's lease, and Midwest could fulfill its remaining wedding venue rental commitments. On September 25, the County sent a ninety-day termination of tenancy notice to Midwest terminating Midwest's lease as of December 26.²

¶6 Midwest sued the County seeking a declaration that (1) the County triggered the lease's buy back clause when the County allowed Rock to develop the property for purposes other than those specified in the Midwest-County lease and (2) the County's relationship with Rock and Rock's entry onto the property caused a constructive eviction of Midwest. The County's counterclaim alleged that Midwest breached the maintenance and repair provisions of its lease and was liable for the cost of remediating the allegedly debilitated and eroded property. The circuit court disposed of all claims on summary judgment.

¶7 On appeal, Midwest seeks review of the circuit court's rulings on its buy back clause and constructive eviction claims. On cross-appeal, the County

² Midwest alleges that it could no longer operate on the property after the end of October 2012.

seeks review of the circuit court's ruling that Midwest did not breach its lease and was not liable for the cost of remediating the property.

¶8 We review the denial of summary judgment independently, and we apply the same methodology as the circuit court. *Wickenhauser v. Lehtinen*, 2007 WI 82, ¶15, 302 Wis. 2d 41, 734 N.W.2d 855. The application of various legal doctrines to undisputed facts presents a question of law that we decide independently. *Id.*

Appeal: Buy Back Clause

¶9 Midwest argued that the County's deal with Rock triggered the Midwest-County lease buy back clause because the County allowed Rock to develop the property for purposes other than those specified in the Midwest-County lease.

¶10 Paragraph twenty-eight, the lease buy back clause, states:

Lessor's Buy Back: If Lessor at any time during the term of this lease shall determine by resolution of its County Board that it needs the use of the Leased Premises described in Exhibit A for whatever purpose, other than those stipulated in Paragraph 4, Lessor shall have the right to terminate this lease upon twelve (12) months advance written notice to Lessee. Furthermore Lessor agrees to pay Lessee the then fair market value of all buildings and improvements constructed on the Leased Premises.

¶11 Paragraph four, referred to in the buy back clause, sets out the uses Midwest could make of the property:

Use: Lessee agrees to use the Leased Premises solely for the operation of a year-round sports center including the establishment of a down hill ski facility with restaurant/chalet and parking lot and other sports activities for all seasons as agreed upon in writing by the Lessor and Lessee (all of which are herein referred to as Sports

Center). Furthermore, Lessee agrees that other sports activities will not include any motorized recreational vehicles.

¶12 Midwest argued that the County's July 2012 board resolution allowed Rock to use the property for baseball fields, bike park, and nonsports entertainment events, uses that were not contemplated by paragraph four. Therefore, in Midwest's view, the County triggered the buy back clause.

¶13 The circuit court rejected this claim because the buy back clause was unambiguous, the Midwest lease allowed Midwest to operate a year-round sports center, and the County authorized Rock to construct and operate "athletic fields and related amenities," uses common to a year-round sports center. Therefore, the buy back clause was not triggered.

¶14 On appeal, Midwest does not argue that factual disputes should have precluded summary judgment. Rather, Midwest attempts to distinguish the activities it offered under its lease from the activities Rock intended to or was authorized to offer and offers an interpretation of the lease and the county board's resolution to support its argument that the County triggered the buy back clause.

¶15 We agree with the circuit court that the lease was unambiguous.³ On the undisputed facts, the uses authorized by the county board's Rock resolution and the uses authorized by Midwest's lease were sufficiently similar so as not to trigger the buy back clause. The lease allowed Midwest to use the property as "a year-round sports center" and prohibited the use of "motorized recreational

³ Because the Midwest lease is unambiguous, "we construe the contract according to its literal terms," and we do not resort to extrinsic evidence to determine the parties' intent. *Tufail v. Midwest Hosp., LLC*, 2013 WI 62, ¶¶26-27, 348 Wis. 2d 631, 833 N.W.2d 586.

vehicles.” The county board’s Rock resolution allowed Rock to construct and operate “athletic fields and related amenities” and did not authorize business-related uses of motorized recreational vehicles. The circuit court found that Rock’s ability to provide “amenities” was consistent with operating a year-round sports center. While Midwest largely operated as a ski hill and Rock intended to offer mountain biking, athletic fields and merchandise, paragraph four of Midwest’s lease expressly permits “other sports activities for all seasons as agreed upon in writing.” Considering this language, the court found that Midwest’s interpretation would produce unreasonable results because it would preclude any tenant from developing or improving the property without triggering the buy back clause.

¶16 Midwest’s arguments on appeal fail to consider the entirety of paragraph four to which the buy back clause refers. Paragraph four, “Use,” contemplates that the parties may agree on “other sports activities for all seasons.” Midwest does not persuade us that this broad language can be ignored when the use clause and the buy back clause are read together. We conclude that Rock’s use of the premises as a year-round sports center did not trigger the buy back clause. The circuit court properly granted summary judgment on this claim.

Appeal: Constructive Eviction

¶17 Midwest argues that it was constructively evicted when the County permitted Rock to enter the property to conduct testing and analysis for development and when Rock began modifying the property and adversely affecting Midwest’s improvements. Midwest argues that it was forced to negotiate the mitigation agreement with Rock to reduce its damages.

¶18 The circuit court rejected Midwest’s constructive eviction claim for the following reasons: (1) paragraph twenty-one of the Midwest-County lease permitted the County to take full ownership and control of the premises and its permanently affixed improvements upon termination of Midwest’s lease; (2) Midwest entered into the mitigation agreement with Rock; (3) Midwest received a lease termination notice before it abandoned the premises; and (4) by entering into the mitigation agreement, which allowed Midwest to fulfill its wedding venue rental obligations, “Midwest negotiated a solution with Rock and received ample consideration in exchange for ceding control of the property [to Rock]. Based on these undisputed facts, Midwest did not quit the property until well after the Mitigation Agreement was signed [September 18] and the [September 25] Termination Notice was received.”

¶19 A tenant claiming constructive eviction must show a disturbance of the tenant’s possession by the landlord or someone acting under the landlord’s authority which renders the premises unfit for the purposes of the tenancy or deprives the tenant of the beneficial enjoyment of the premises, causing the tenant to abandon the premises, “provided the tenant abandons the premises within a reasonable time.” *First Wis. Trust Co. v. L. Wiemann Co.*, 93 Wis. 2d 258, 268, 286 N.W.2d 360 (1980) (citation omitted). The tenant must give the landlord notice of the defects and alleged breach and the landlord has a reasonable period of time to remedy the defects and alleged breach before the tenant has a right to quit the premises due to the alleged breach. *Id.*

¶20 Here, it is undisputed that on September 4, 2012, Midwest gave the County notice of the County’s alleged breach of the lease. On September 7, the County denied any breach. On September 18, Midwest entered into the mitigation agreement with Rock. On September 25, the County gave Midwest a ninety-day

termination notice. Midwest apparently left the property at the end of October 2012.

¶21 We conclude that Midwest's constructive eviction claim fails because Midwest did not abandon the property within a reasonable period of time of the alleged disturbance of its tenancy. Rather than taking the steps required to make a constructive eviction claim after the County's September 7 denial of Midwest's breach claim, Midwest elected to reach a mitigation agreement with Rock on September 18 to remain on the premises to conduct certain business activities. Under these circumstances, Midwest did not abandon the premises within a reasonable time. Because Midwest did not establish the elements of a constructive eviction, the circuit court did not err in granting summary judgment on this claim.

Cross-Appeal: Midwest's Breach of Lease Due to Erosion

¶22 In a counterclaim, the County alleged that Midwest breached the lease's maintenance and repair clause (paragraph twelve) because Midwest did not remedy damage to the site resulting from slope failure and erosion.

¶23 Paragraph twelve, maintenance and repair, states:

Lessee, at its sole expense, shall maintain, replace and keep in good order and repair, and in a safe and sanitary condition, the entire Leased Premises and all improvements from time to time located thereon.

¶24 The circuit court granted summary judgment to Midwest on the County's claim. Citing *Lindsay Bros., Inc. v. Milwaukee Cold Storage Co.*, 58 Wis. 2d 658, 666, 207 N.W.2d 639 (1973), the circuit court construed paragraph twelve as imposing a minimal duty on Midwest to undertake repairs and only to

the extent necessary to allow the premises to be used for the leaseholder's purpose. The court found that Midwest continued to operate the property as a year-round sports center from 2008 until 2012 and that Rock was using the property for the same purpose. The court concluded that Midwest was not responsible for damage or repairs to the property because the same did not preclude use of the property as a year-round sports center. Therefore, the court rejected the County's breach claim because Midwest met its repair and maintenance obligations under the lease.

¶25 On appeal, the County argues that the circuit court erroneously relied upon *Lindsay Bros.* and failed to consider other relevant lease terms bearing on the question of Midwest's obligation to maintain and repair the property. Specifically, the County cites paragraph eighteen (if the premises are damaged by fire or other casualty, the premises shall be repaired as quickly as possible by Midwest and "paid for" from proceeds from fire insurance). The County also cites the provisions of Exhibit C to the Midwest-County lease in which the County specified the dimensions of the ski hill and addressed certain specified conditions along the south and west property lines. We are not persuaded that either *Lindsay Bros.* or these lease provisions hold the key to this appellate issue.

¶26 We are persuaded by Midwest's argument that the County did not take steps to enforce its claimed rights under paragraph twelve. The chronology supports Midwest's argument. Midwest's long-term lease terminated in 2008. From 2008 to 2012, the County and Midwest entered into successive one-year leases. Those one-year leases encompassed the period during which the County claims Midwest was bound under paragraph twelve to maintain and repair the property. The County made demands on Midwest in 2009 and 2010 to repair the site, but the County continued to enter into one-year lease terms with Midwest even though Midwest did not comply with these demands. Midwest's lease

terminated in December 2012. Other than drawing Midwest's attention to the County's contention that Midwest was in breach of paragraph twelve, the County did not seek to enforce the provisions of paragraph twelve until May 2013 when the County filed its counterclaim. For that reason, we affirm the circuit court's decision granting summary judgment on the County's counterclaim.

Conclusion

¶27 We affirm the circuit court with regard to the issues raised in Midwest's appeal and the County's cross-appeal.

¶28 Because we affirm on the appeal and the cross-appeal, we decline to award WIS. STAT. RULE 809.25 costs to either party.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

